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STATE OF MICHIGAN

IN THE SUPREME COURT

In re: ESTATE OF
HERMANN A VON GREIFF

Michigan Supreme Court Case No:
Court of Appeals No: 347254
Probate Court No: 18-34046-DE

APPELLANT CARLA VON GREIFF'S APPLICATION FOR LEAVE TO APPEAL

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ORDER APPEALED FROM AND RELIEF SOUGHT

Appellant, Carla J. Von Greiff, seeks leave to appeal the Court of Appeals' 2-1 published opinion dated April 23, 2020 reversing the Marquette County Probate Court's opinion and order dated December 26, 2018 and creating a common law exception to the unambiguous language of MCL 700.2801(2)(e). Appellant respectfully requests that this Honorable Court grant leave to appeal, reverse the Court of Appeals' decision and affirm the Marquette County Probate Court's decision, or, in the alternative, peremptorily reverse the Court of Appeals majority for the reasons set forth in the Court of Appeals dissent.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the Court of Appeals have the authority to create a common law exception to a clear and unambiguous statute that provides for no such exceptions within its language?

   The Court of Appeals majority answers yes.
   The Court of Appeals dissent answers no.
   Appellant answers no.
   Appellee answers yes.
   The Probate Court did not reach this issue.

2. Was the Court of Appeals correct in creating a common law exception to MCL 700.2801(2)(e)(i), finding that statute, as a matter of law, does not apply when divorce proceedings are pending between spouses at the time of one spouse's death?

   The Court of Appeals majority answers yes.
   The Court of Appeals dissent answers no.
   Appellant answers no.
   Appellee answers yes.
   The Probate Court did not reach this issue.

3. Was the Probate Court in error when it applied the facts of the case, including Appellee's own admissions, to the unambiguous language of MCL 700.2801(2)(e)(i) and determined that

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Appellee had abandoned her deceased husband and was not considered his surviving spouse pursuant to that statute?

The Court of Appeals majority answers yes.
The Court of Appeals dissent answers no.
Appellant answers no.
Appellee answers yes.
The Probate Court answers no.

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INTRODUCTION AND REASONS FOR GRANTING LEAVE TO APPEAL

The issue in this case is whether the Court of Appeals, in a published opinion, invaded the province of the legislature and improperly created a common law exception to an unambiguous statute that contains no such exception within its terms. Appellee Anne Jones-Von Greiff ("Appellee") admitted that she chose to be both physically and emotionally apart from her late husband, Hermann Von Greiff ("Decedent") in the last 13 months of his life. Appellee's admission of total absence resulted in her not being considered Decedent's surviving spouse pursuant to MCL 700.2801(2)(e)(i). That statute states, in part: "…a surviving spouse does not include any of the following: (e) An individual who did any of the following for 1 year or more before the death of the deceased person: (i) Was willfully absent from the decedent spouse." MCL 700.2801(2)(e)(i).

The Marquette County Probate Court, applying the undisputed facts to the operative statute, concluded that Appellee was not her late husband's surviving spouse pursuant to MCL 700.2801(2)(e)(i). However, the Court of Appeals, in a 2-1 published opinion, determined that MCL 700.2801(2)(e)(i) did not apply to Appellee, because she and Decedent were engaged in divorce proceedings when he died. Relying on common law decisions from Georgia, Iowa and California (each of which predate the Uniform Probate Code, upon which Michigan's Estates and Protected Individuals Code is largely based), "common sense" and the legal maxim *expressio unius est exclusio alterius*, the panel majority created an exception to the unambiguous language of MCL 700.2801(2)(e)(i), finding the statute does not apply when divorce proceedings are pending at the time of one spouse's death. In so finding, the panel majority not only contravened the unambiguous language of the statute, but also disregarded this Court's decision in *In re Erwin Estate*, 503 Mich 1; 921 NW2d 308 (2018).

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This Court should grant leave to appeal. It is not the role of the Court of Appeals to rewrite an unambiguous statute or to circumvent this Court's decisions to suit its policy preferences. Indeed, this Court has consistently ruled that a court may not, "rewrite the plain statutory language and substitute [its] own policy decisions for those already made by the Legislature." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000); see also, *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999) ("The responsibility for drawing lines in a society as complex as ours – of identifying priorities, weighing the relevant considerations and choosing between competing alternatives – is the Legislature's, not the judiciary's."). Appellee irrefutably and willfully abandoned Decedent more than one year prior to his death. Consequently, Michigan's Estates and Protected Individuals Code ("EPIC") unequivocally states that she should not receive the benefits of a surviving spouse. As the Court of Appeals dissent stated:

> Under the actual language of the statute, an individual is not a surviving spouse if: (1) for a year or more before decedent's death (2) he or she was willfully absent from the decedent spouse. In contrast, under the majority's reasoning, the statute is rewritten to disinherit a surviving spouse if: (1) for a year or more before decedent's death (2) he or she is willfully absent from the decedent spouse, and (3) he or she is not in the process of obtaining a divorce or annulment from the divorcing spouse.
>
> * * *
>
> …it is not the place of the judiciary to rewrite the plain language of this or any other statute enacted by the Legislature.

(Dissent at 5).

This Court should grant leave to appeal based upon the erroneous ruling of the panel majority, which is both in contradiction to the unambiguous language of MCL 700.2801 and an overstep of the Court of Appeals' authority. The majority has impermissibly supplanted the Legislature's language with its own notions and preferences. Under the clear language set forth

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by this State's Legislature, Appellee is not the surviving spouse of the Decedent. The panel majority's circumvention of the plain language of MCL 700.2801 is in violation of its duties to enforce and interpret – not rewrite – statutes promulgated by the Legislature.

Moreover, the case will most assuredly have a substantial impact on Michigan jurisprudence in several, independent respects. First, the panel majority's ruling creates uncertainty around an otherwise unambiguously written and clearly interpreted statute. This Court recently created a two-prong test to analyze whether willful abandonment under MCL 700.2801(2)(e)(i) has occurred. *Erwin Estate*, 503 Mich at 27 (willful abandonment is defined as, "complete physical and emotional absence… resulting in the end to the marriage for practical purposes"). However, the majority in *Von Greiff* dismantled the certainty of *Erwin* and opened the door to any number of possible "common sense" exceptions as to why the abandonment statute should not be applied as written. As noted by the dissent, the majority opinion is written to, "suit [its] policy preferences," rather than to provide a fair interpretation of the actual statute.

Second, the ruling will allow for gamesmanship in both divorce and probate proceedings. In *Von Greiff*, the majority ruled that, "participation in a legal divorce process, regardless of its length," renders MCL 700.2801(2)(e)(i) inapplicable. Hypothetically, the mere filing of a divorce action would defeat the statute, as would divorce proceedings that lay dormant, without finalization or dismissal. Under the panel majority's decision, a spouse who has been willfully absent for years will be able to create rights in the other's property simply by filing a complaint for divorce at the end of the other spouse's life. This would have the effect of frustrating the estate plans of abandoned spouses who wish to leave their estate to other devisees, and who believe that their long-departed spouses would have no claim or interest to that property. Further, where divorce proceedings are pending and one spouse falls ill, the other spouse may

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attempt to delay proceedings needlessly in order to be considered a surviving spouse rather than to timely finalize a divorce. As in the present case, surviving spouses would potentially receive a windfall of assets, including receipt of joint assets that would have been divided upon completion of divorce proceedings, and a share of the assets owned individually by decedent spouses through probate proceedings. In addition to creating a windfall for surviving spouses, this outcome may frustrate decedent spouses' estate planning intentions, as noted, *supra*.

Third, the Court of Appeals overstepped its authority by creating a blanket common law exception to an unambiguous statute that allows for no such exceptions, and has done so through a published opinion that is now binding precedent on every appellate, probate and circuit court in the State of Michigan. Again, as articulated by this Court, "[t]he responsibility for drawing lines in a society as complex as ours – of identifying priorities, weighing the relevant considerations and choosing between competing alternatives – is the Legislature's, not the judiciary's." *Van*, 460 Mich at 327 (quotation marks and citations omitted). Changing statutes to fit perceptions of fairness in a particular case is very dangerous, because it may result in unintended consequences, such as allowing a surviving spouse to receive an even greater share of the marital estate – even all of it – despite cutting off all contact and despite having far greater resources than the decedent spouse. Only the Legislature should make statutory changes out of such equitable concerns, which have to be balanced from all sides across an entire landscape of potential outcomes. *Id.* Judges, appellate or otherwise, should not rewrite statutes to achieve what the judge believes is fair in a single, particular case.

In sum, this case presents issues of significant legal import, and the majority decision by the Court of Appeals contradicts the Legislature's words, this Court's precedential guidance, and is plainly erroneous. Appellant seeks leave to appeal pursuant to MCR 7.305(B)(3) and (5) and

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respectfully request that this Court reverse the Court of Appeals' decision and reinstate the probate court's ruling in favor of Appellant. Alternatively, Appellant respectfully requests that this Court peremptorily reverse the majority decision for the reasons set forth in the Court of Appeals' dissent.

STATEMENT OF FACTS AND PROCEEDINGS

I. Appellee Intentionally Ceased All Contact with Decedent More than One Year Prior to His Death and Lived as Though Her Marriage to Decedent had Ended

The material facts of the case are not in dispute. Appellee and Decedent were married on June 12, 2000. (12/26/18 Probate Order at p 1). Appellant and Decedent divorced just a few months later. (*Id*). Appellant and Decedent then re-married on January 10, 2003. (*Id*). They remained married until Decedent's death on June 17, 2018. (Trial Exhibit 1). However, between May of 2017 and Decedent's death in June of 2018, Appellant and Decedent had no contact with each other. (12/26/18 Probate Order at p 2).

On the eve of Decedent undergoing spinal surgery, Appellee announced that she was leaving Decedent following an argument several days prior. (11/7/18 Afternoon Transcript at pp 9-10). Appellee testified that she left Decedent that evening and never spoke to him again. (11/7/18 Morning Transcript at pp 39-40, 124). Appellee testified that Decedent asked her to stay, but she refused. (11/7/18 Morning Transcript at p 41).

Appellee testified that she provided no emotional or physical support to Decedent after May of 2017, *to wit*:

> Q. So based on your testimony, you had no physical contact with [Decedent] after May 18, 2017 and offered no emotional support to him after May 31, 2017, correct?
> A. Correct.

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(8/21/18 Transcript at p 13). Following Decedent's surgery on May 19, 2017, Appellee was invited to come to the hospital to see and visit him. Appellee refused those invitations. (8/21/18 Transcript at pp 17-19). Further, Appellee testified that she was not planning on personally caring for Decedent or arranging professional care for him following his surgery:

> Q. And you were at this time, you had met with an attorney physically to discuss divorce proceedings when this text message was sent on May 26th, correct?
> A. Correct.
>
> Q. You were not planning on caring for [Decedent] or--or orchestrating his--his care, correct?
> A. No.
>
> Q. Okay. No, you weren't?
> A. I was not.

(11/7/18 Morning Transcript at p 69). Following his surgery, Decedent suffered significant complications, including pneumonia, and remained hospitalized for three weeks. (11/7/18 Afternoon Transcript at p 25, 30). Again, Appellee offered no assistance or support. (11/7/18 Morning Transcript at p 69). Appellee's last communication to Decedent's family was a text message sent on May 31, 2017 (Appellee had no direct contact with Decedent after May 18, 2017). (8/21/18 Transcript at p 13).

Regarding the effective termination of Appellee's and Decedent's marriage, Appellee testified that she never changed her mind about divorcing Decedent and that she never changed her mind about wanting to live apart from him, *to wit*:

> Q. And at no time after filing your Complaint for Divorce did you change your mind and attempt to re-enter your marriage with [Decedent], correct?
> A. No. Correct.

* * *

Q. … despite the invitations, you refused to see and visit Herman, correct?
A. Correct.

* * *

Q. … when you testified earlier that at the time of filing the divorce, you didn't want [Decedent] living with you. Did you change your mind on that topic at some point?
A. No.

Q. You always wanted [Decedent] residing away from you, correct?
A. At that time, yes.

Q. Through the date of his death?
A. Yes. Okay?

Q. Thank you. So at no time between filing for the divorce and Herman Von Greiff's death, did you want to reside with him?
A. No.

* * *

Q. … we've now reviewed a Complaint for Divorce, an Ex Parte Order, and a Reply, all filed on your behalf in the divorce action asking that—where you ask that you have exclusive use of the marital home. To the exclusion of [Decedent]. You have testified that you no longer wanted to live with [Decedent]. Is it fair to say that you had no intention of returning to this marriage?
A. Correct.

(8/21/18 Transcript at pp 14, 19, 26, 29).

Appellee testified that her marriage to Decedent effectively ended on May 18, 2017 and that the couple lived as a divorced couple for all intents and purposes from that point forward, *to wit*:

Q. … You [and Decedent], for all intents and purposes, lived as a divorced couple beginning May 18th; separate and apart. Wouldn't you agree?
A. I guess so.

(11/7/18 Morning Transcript at p 132).

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On June 17, 2018, over one year after his last contact with Appellee, Decedent passed away. (8/21/18 Transcript at p 11).

II. Following a Multi-Day Trial, the Probate Court Held that Appellee is Not Decedent's Surviving Spouse Pursuant to MCL 700.2801(2)(e)(i)

Appellant filed a petition seeking a determination that Appellee had abandoned Decedent under MCL 700.2801(2)(e)(i). As outlined, *supra*, Appellee readily admitted to having no contact with Decedent for over one year prior to his death, and that she chose her course of conduct willingly and affirmatively. (8/21/18 Transcript at pp 14, 13, 19, 26, 29). She never wanted to reside with or be married to Decedent again. *Id.*

On December 26, 2018, following a multi-day trial and based upon the undisputed facts and admissions by Appellee concerning her total purposeful lack of contact with Decedent in the 13 months prior to his death, the probate court issued its Opinion and Order determining that the requirements of MCL 700.2801(2)(e)(i) had been met and that Appellee had abandoned Decedent under that statute. As stated by the probate court:

> At no time after filing the divorce, did [Appellee] ever express a desire to live with [Decedent]. [Appellee] further agreed that after the filing of the divorce, she never had an intention to return to the marriage. She agreed that for all intents and purposes, that [*sic*] she and [Decedent] lived as a divorced couple from May 18, 2017 until his death on June 17, 2018.
>
> * * *
>
> This Court is not looking to [Appellee] to make a continuous effort to maintain the marital relationship. Rather, this Court is focused on the "absenting" practiced by [Appellee]. She filed for divorce, sought exclusive use of the home, told the Court in her testimony that after filing for divorce, she never had the intent to return to the marriage. She agreed that the couple lived as a divorced couple after May 18, 2017. The fact that she never contacted [Decedent], support [*sic*] her statements that it was her intention to leave the marriage.
>
> * * *
>
> There was no indication from [Appellee] that at any time from May 2017 until [Decedent]'s death [*sic*] felt that she and

> [Decedent] were still husband and wife. There was no testimony or evidence showing an emotional connection between [Decedent] and [Appellee]. There was no evidence of the couple's continuing relationship for the one year preceding the death of [Decedent].
>
> This Court finds that [Appellee] is not a surviving spouse for the purposes of MCL 700.2801 as there was physical and emotional absence by [Appellee] that resulted in the end of the VonGreiff's marriage for all practical purposes. [Appellee] took action that was akin to a complete repudiation of the marriage.

(12/26/18 Order at pp 5-10).

III. The Court of Appeals Reversed the Probate Court in a 2-1 Published Decision

The Court of Appeals reversed and, in doing so, created a common law exception to an unambiguous statute that provides for no such exceptions. The panel majority ruled that, as a matter of law, MCL 700.2801(2)(e)(i) is inapplicable when divorce proceedings are pending. The majority based its ruling upon: 1) common law decisions from Georgia, Iowa and California (decided in 1958, 1931 and 1952, respectively), 2) the legal maxim *expressio unius est exclusio alterius*, and 3) "common sense." Nowhere did the panel majority reconcile its reliance on these factors with the plain language of MCL 700.2801(2)(e)(i).

The Court of Appeals dissent disagreed with the panel majority's rationale, and instead drew its conclusions from the plain language of MCL 700.2801(2)(e)(i) and this Court's binding guidance in *Erwin Estate*, *to wit*:

> Our Supreme Court has already provided binding guidance on the interpretation of MCL 700.2801(2)(e)(*i*), and unlike the majority's interpretation, the Supreme Court relied upon the plain language of the statute. In *In re Estate of Erwin*, 503 Mich 1, 9; 921 NW2d 308 (2018), the Court stated that
>
> > "an individual is not a surviving spouse for the purposes of MCL 700.2801(2)(e)(*i*) if he or she intended to be absent from his or her spouse for the year or more leading up to the spouse's death. Absence in this context presents a factual inquiry based on the totality of the circumstances,

> and courts should evaluate whether complete physical and emotional absence existed, resulting in an end to the marriage for practical purposes. The burden is on the party challenging an individual's status as a surviving spouse to show that he or she was "willfully absent," physically and emotionally, from the decedent spouse. [*Erwin Estate*, 503 Mich at 27-28.]"
>
> Here, it is factually undisputed that [Appellee] was both physically and emotionally absent from [Decedent] for over a year prior to his death. [Appellee] testified that when [Decedent] died "we were already divorced" and were just "waiting for the final judgment." She further testified that from May 18, 2017 until [Decedent]'s death on June 17, 2018, they lived as a divorced couple… In addition, [Appellee] unequivocally stated that she did not provide [Decedent] with any direct emotional support after May 18, 2017.

(Dissent at 2). The dissent would not have disturbed the probate court's decision and would have affirmed that court's ruling in favor of Appellant.

ARGUMENT

I. The Court Should Grant Leave to Appeal to Resolve the Important Legal Question of Whether the Court of Appeals was Correct in Creating a Common Law Exception to MCL 700.2801(2)(e)(i) when the Plain Language of that Statute Provides for No Such Exception

MCL 700.2801 states, in pertinent part:

> (2) For purposes of parts 1 to 4 of this article and of section 3203, a surviving spouse does not include any of the following:
>
> * * *
>
> (e) An individual who did any of the following for 1 year or more before the death of the deceased person:
>
> (i) Was willfully absent from the decedent spouse.

MCL 700.2801(2)(e)(i). Under the Court of Appeals' published decision, a common law exception was created, which renders this clear and unambiguous statute a nullity when divorce proceedings are pending at the time of the deceased spouse's death. The panel majority's ruling is contrary to the law and is an overstep of judicial authority. This Court should grant leave to address and correct this important legal issue.

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A. Statutes May Not Be Rewritten By Courts

"Under the Michigan Constitution and its division of power between the Legislature and the judiciary, [courts] are only authorized to implement statutes, not change them in response to policy arguments, regardless of how persuasive." *Miller v Riverwood Recreation Center, Inc*, 215 Mich App 561, 563; 546 NW2d 684 (1996); see also Const 1963, art 3 § 2. As thoroughly articulated by this Court:

> …if courts are free to cast aside a plain statute in the name of equity, even in such a tragic case as this, then immeasurable damage will be caused to the separation of powers mandated by our Constitution. Statutes lose their meaning if "an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity." Significantly, such unrestrained use of equity also undermines consistency and predictability for plaintiffs and defendants alike.

Trentadue v Buckler Lawn Sprinkler, 479 Mich 378, 406-407; 738 NW2d 664 (2007) (citations omitted).

The Michigan Constitution and a plethora of case law from this Court and the Court of Appeals resolutely prohibit exactly what the panel majority did here: rewriting a statute based upon its own policy preferences and notions of fairness. As noted by the Court of Appeals' dissent:

> Rather than interpreting the statute, the majority rewrites it to suit the majority's policy preferences. I would apply the actual language of the statute, not the majority's rewrite of it. Under the actual language of the statute, an individual is not a surviving spouse if: (1) for a year or more before decedent's death (2) he or she was willfully absent from the decedent spouse. In contrast, under the majority's reasoning, the statute is rewritten to disinherit a surviving spouse if: (1) for a year or more before decedent's death (2) he or she is willfully absent from the decedent spouse, and (3) he or she is not in the process of obtaining a divorce or annulment from the divorcing spouse.

(Dissent at 5). By adding a third criterion, which invalidates MCL 700.2801(2)(e)(i) when divorce proceedings are pending, the panel majority effectively rewrote the statute. In today's society, where it is estimated that over 40% of marriages end in divorce[1], the panel majority's decision will broadly impact the application of MCL 700.2801(2)(e)(i). Regardless, the public policy reasons behind the panel majority's decision are of no consequence – courts cannot change statutes; only the Legislature holds that power. *Trentadue*, 479 Mich at 406-407; Const. 1963, art 3, § 2.

In *Erwin Estate*, this Court refused to read additional language into MCL 700.2801(2)(e)(i), ruling, "MCL 700.2801(2)(e)(i) does not require proof that a spouse intends to abandon his or her marital rights. Courts should not resort to judicial construction when the words of the Legislature are clear and unambiguous." *Erwin Estate*, 503 Mich at 25 (citations omitted). Importantly, this Court has already determined that the language of MCL 700.2801(2)(e)(i) is "clear and unambiguous" and does not require the aid of, "judicial construction." *Id.* As MCL 700.2801(2)(e)(i) is "clear and unambiguous," the panel majority's attempt to, "wiggle free from the constraints of the statutory language" constitutes an inappropriate overreach, and this Court should grant leave to appeal to correct this error. *Id*; see also, (Dissent at 3); see also, *Trentadue*, 479 Mich at 406-407.

B. The Court of Appeals Failed to Follow the Binding Precedent Established by This Court in *Erwin Estate*

The Court of Appeals is:

> bound by our Supreme Court's decision . . . until such time as our Supreme Court instructs otherwise: "it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete,

[1] Institute for Family Studies, *What is the Divorce Rate Anyway?*<https://ifstudies.org/blog/what-is-the-divorce-rate-anyway-around-42-percent-one-scholar-believes/> (accessed June 18, 2020).

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> and until [that] Court takes such action, the Court of Appeals and all lower courts are bound by that authority."

State Treasurer v Sprague, 284 Mich App 235, 242; 772 NW2d 452 (2009) (citations omitted). In that regard, this Court has provided binding authority on MCL 700.2801(2)(e)(i) that the panel majority improperly ignored.

In *Erwin Estate*, this Court provided binding guidance defining abandonment in the context of MCL 700.2801(2)(e)(i). This Court determined that the language of that statute was, "clear and unambiguous," and that willful absence:

> is most reasonably defined as referring to complete physical and emotional absence from the deceased spouse. This definition is consistent with the statutory scheme as a whole, which contemplates that one only loses his or her status as a "surviving spouse" if he or she takes action that is akin to a complete repudiation of the marriage.

Erwin Estate, 503 Mich at 18. Had the panel majority applied the definition of willful absence promulgated by this Court in *Erwin Estate*, there is no question that the probate court's decision would have been affirmed. However, as noted by the Court of Appeals dissent, rather than follow, "the language of the statute and the *Erwin* Court's interpretation of it" the panel majority attempts to, "wiggle free from" MCL 700.2801(2)(e)(i) and this Court's guidance.

C. The Court of Appeals' Rationale in Reaching Its Majority Decision was Incorrect

In creating its common law exception to MCL 700.2801(2)(e)(i) and concluding, as a matter of law, that the statute is inapplicable when divorce proceedings are pending, the panel majority relied upon the common law of California, Iowa and Georgia, "common sense," and the legal maxim, *expressio unius est exclusio alterius*. The panel majority declined to apply the undisputed facts of the case to the unambiguous statute promulgated by the Michigan

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Legislature. Consequently, the panel majority reached an incorrect decision based upon a misapplication of the law.

1. THE COURT OF APPEALS' APPLICATION OF COMMON LAW FROM FOREIGN JURISDICTIONS WAS UNNECESSARY AND INAPPROPRIATE

Rather than enforcing the "clear and unambiguous" terms of MCL 700.2801(2)(e)(i), the panel majority incorrectly created a conflicting rule to that statute based upon common law from jurisdictions outside of Michigan. *Erwin Estate*, 503 Mich at 25. "It is the function of the Legislature, not the judiciary, to make laws, and legislatively-enacted laws will always take precedence over judge-made common law." *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 544 n 5; 683 NW2d 200 (2004) citing *O'Brien v Hazelet & Erdal*, 410 Mich 1, 15; 299 NW2d 336 (1980). "[I]f there is a conflict between the common law and a statutory provision, the common law must yield." *Pulver v Dundee Cement Co*, 445 Mich 68, 75 n 8; 515 NW2d 728 (1994).

In the present action, the panel majority turned to the common law, because the outcome required by the operative statute did not suit its policy preferences. As stated by the Court of Appeals dissent:

> In its effort to wiggle free from the constraints of the statutory language, the majority begins with a review of the common law. This is unwarranted. The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, is a comprehensive statutory creation. As a result, it supersedes the common law. See *Hoertsman Contracting Co, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) ("In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific imitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.") (quotation marks and citation omitted).

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(Dissent at 3-4). There is no question: MCL 700.2801(2)(e)(i) supersedes Michigan common law, and certainly supersedes the common law from jurisdictions outside of Michigan. *Hoertsman Contracting Co*, 474 Mich at 74. To that end, cases from foreign jurisdictions are non-binding, and are only properly considered persuasive if they do not conflict with Michigan law. *People v Niver*, 7 Mich App 652, 657; 152 NW2d 714, 716 (1967). The panel majority was incorrect in seeking guidance from the conflicting common law of foreign jurisdictions, where the language of the at-issue statute is, "clear and unambiguous." *Id*; *Erwin Estate*, 503 Mich at 25.

The foreign decisions relied upon by the panel majority were also decided under outdated legal framework that is no longer applicable. EPIC is modeled on the Uniform Probate Code ("UPC"). *In re Sprenkle-Hill Estate*, 265 Mich App 254, 259; 703 NW2d 191 (2005). The UPC was first published in 1969, while the foreign common law cited by the panel majority was issued in 1958, 1931 and 1952 – well before the UPC's first release. Additionally, none of the jurisdictions relied upon by the panel majority has adopted the UPC, further distinguishing those bodies of law from EPIC[2].

Moreover, the caselaw from California, Iowa and Georgia upon which the panel majority relied is further distinguished by the fact that those cases were decided *before* those states instituted no-fault divorce. This is of critical importance, as fault was a central issue in deciding each of those decisions. With respect to Michigan law, this state has not required the apportionment of fault in divorce proceedings since the introduction of no-fault divorce under MCL 552.6 nearly 50 years ago, and certainly the plain language of MCL 700.2801(2)(e)(i) does

[2] Uniform Law Commission, *Probate Code* <https://www.uniformlaws.org/committees/community-home?CommunityKey=a539920d-c477-44b8-84fe-b0d7b1a4cca8> (accessed June 19, 2020).

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not require such a finding. The viability of those foreign rulings has been mitigated by the introduction of no-fault divorce law, both within those jurisdictions and in Michigan.

Regarding the specific cases, the California decision, *In re Ehler's Estate*, 115 Cal App 403; 1 P2d 546 (1931), and the Iowa decision, *In re Quinn's Estate*, 243 Iowa 1271; 55 NW2d 175 (1952), each addressed the denial of spousal benefits when one spouse dies during pending divorce proceedings, however, neither of those cases involved the application of an abandonment statute equivalent to MCL 700.2801(2)(e)(i). Indeed, the primary question in those cases was whether or not those courts could apportion fault in the underlying divorce action and use that apportionment of fault to deny benefits to the surviving spouse in probate proceedings. The issue of fault and the foreign courts' analysis and findings are wholly inapplicable to the instant case and as-issue statute.

Again, the analysis of fault was at-issue in those matters because those cases were decided prior to those states instituting no-fault divorce law. Consequently, the courts in *Ehler's Estate* and *Quinn's Estate* relied on the rationale that to preclude a surviving spouse from receiving a spousal interest would require an adjudication of the "fault" issue then inherent in divorce actions. By contrast, the primary issue in this case is the application and applicability of MCL 700.2801(2)(e)(i), which is a bright line test that has nothing to do with divorce actions, let alone the apportionment of fault.

The fact that the cases from California and Iowa: 1) concerned the apportionment of fault in the underlying divorce proceedings, *and* 2) did not address a statute similar to MCL 700.2801(2)(e)(i), underscores the immaterial nature of those decisions.

Regarding the panel majority's reliance on the Georgia decision, *Born v Born*, 213 Ga 830; 102 SE2d 170 (1958), that case is even less persuasive, as it had nothing to do with the

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death of one spouse or the denial of spousal benefits to the survivor, but merely addressed desertion as grounds for divorce wherein an offer to reconcile is extended. The *Born* case addressed a situation where a husband filed for divorce in France against his wife, offered to reconcile, was refused reconciliation and subsequently re-filed for divorce in Georgia on the grounds of desertion. *Id*, 213 Ga, at 830-831. The wife objected to the divorce, claiming that the time during which the French divorce action was pending could not be used towards the time required to claim desertion. *Id*. The Georgia Supreme Court disagreed, ruling that the refused offer of reconciliation negated the wife's argument that the French divorce action tolled the clock on a claim for desertion. *Id*, 213 Ga, at 833. The *Born* decision has no factual relation to the present action, as that case was decided prior to the introduction of no-fault divorce, further diminishing its applicability. Moreover, the portion of the *Born* decision quoted by the panel majority is mere dicta; in fact, the ultimate ruling in *Born* creates an exception to the general proposition quoted by the panel majority. Ultimately, nothing in that Georgia opinion addressed an abandonment statute akin to MCL 700.2801(2)(e)(i) and had nothing to do with the rights of a surviving spouse, making it inapplicable to the instant action.

In sum, statutory law supersedes the common law, and the Court of Appeals' decision was reached in error. *Hoertsman Contracting Co*, 474 Mich at 74. Moreover, the cases relied upon by the panel majority were decided under outdated, foreign systems of probate and divorce law that have since been supplanted in Michigan and even within those foreign jurisdictions. To the extent Michigan jurisprudence ever followed the rationale of California, Iowa and Georgia courts in the 1930's and 1950's with respect to spousal rights and abandonment, the introduction of EPIC, as well as no-fault divorce, eviscerated any persuasive value decisions from those states in those eras may have had. Indeed, none of the foreign cases even involved an abandonment

statute comparable to MCL 700.2801(2)(e)(i). Those rulings (which had not been cited in a reported decision since the 1970's until the panel majority resuscitated them) are of no relevance or applicability to the modern provisions of EPIC, including MCL 700.2801(2)(e)(i) and were improperly relied upon by the panel majority.

2. THE COURT OF APPEALS' RELIANCE ON THE MAXIM *EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS* WAS MISPLACED

The panel majority takes the position that the 2017 amendment to MCL 700.2801 (which added subsection (3)), indirectly modified MCL 700.2801(2)(e)(i), causing a third criterion to silently attach to that statute. The panel majority finds that the Legislature's specific preclusion of a spouse who is engaged in divorce proceedings from acting as a funeral representative for his or her decedent spouse must necessarily mean that the Legislature did *not* want to preclude married couples engaged in divorce proceedings from being denied spousal rights under MCL 700.2801(2)(e)[3]. The panel majority justifies its position under the legal maxim *expression unius est exclusion aterius*. Respectfully, the panel majority is incorrect.

First, to apply *expressio unius est exclusio alterius* as the panel majority suggests, "would allow [that canon] to overcome the plain meaning of the words" of MCL 700.2801(2)(e)(i). *People v Garrison*, 495 Mich 362, 372; 852 NW2d 45 (2014). However, as noted by the Court of Appeals dissent, "this canon of construction cannot be employed if doing so would defeat the statute's clear legislative intent." (Dissent at 4, citing *AFSCME Council 25 v Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005)). Again, the panel majority's interpretation adds a third prong to the two-prong test for abandonment articulated by the Legislature. (Dissent at 5). Hence, to interpret the statute in the manner proclaimed by the panel majority would be to render

[3] The Court of Appeals' rationale equally impacts all subsections of MCL 700.2801(2)(e), not just MCL 700.2801(2)(e)(i).

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MCL 700.2801(2)(e)(i) nugatory in instances where divorce proceedings were pending. This result is contrary to the "clear and unambiguous" language of that statute. *Erwin Estate*, 503 Mich at 25. Consequently, *expressio unius est exclusio alterius* cannot be applied in this instance, as to do so would be to impermissibly rewrite the statute. *Garrison*, 495 Mich at 372.

Second, MCL 700.2801(3) was enacted after MCL 700.2801(2)(e), and while persons engaged in divorce proceedings are specifically included in the more recent statute, that does not mean such persons are excluded from the effects of the older statute. As this Court has noted:

> [i]t is one thing to infer legislative intent through silence in a simultaneous or subsequent enactment, but quite another to infer legislative intent through silence in an earlier enactment, which is only 'silent' by virtue of the subsequent enactment.

People v Watkins, 491 Mich 450, 482; 818 NW2d 296 (2012). As was well reasoned by the Court of Appeals:

> [t]here are likely many reasons—policy and nonpolicy alike— why the Legislature would choose to amend one section of law without at the same time amending a related section, including interest, resources, politics, attention, etc.

People v Mullins, 322 Mich App 151, 165-166; 911 NW2d 201 (2017). The panel majority reasoned that the inclusion of divorce proceedings under MCL 700.2801(3) must be construed as the Legislature purposefully excluding divorce proceedings from the effects of MCL 700.2801(2)(e). However, MCL 700.2801(2)(e) was enacted before MCL 700.2801(3) and, under the Legislative silence rule of statutory construction, silence in an earlier statute may not be inferred if that silence is created by virtue of the enactment of a subsequent statute. *Watkins*, 491 Mich at 482.

Third, the panel majority ignores the fact that MCL 700.2801(2) and MCL 700.2801(3) address very different issues. Subsection (2) addresses inheritance rights, while subsection (3)

addresses funeral representative rights. While both are personal in nature, they are largely unrelated rights. Funeral representative issues are typically addressed immediately upon a decedent's passing and require a certain amount of urgency in order to make funeral and burial arrangements. Inheritance rights, especially when contested, will be subject to a lengthier legal process, as was the case in the instant action. To conflate the Legislature's reasoning on funeral representative rights with the Legislature's reasoning on inheritance rights would be to conflate apples with oranges. While both issues arise out of the death of an individual, that is where the similarities largely end.

Ultimately, the panel majority's reliance upon the legal maxim *expressio unius est exclusio alterius* is incorrect. That canon may not be used to defeat the plain meaning of a statute and the rules of statutory construction are against the interpretation advanced in the Court of Appeals' decision. *AFSCME Council 25*, 267 Mich App at 260.

3. THE COURT OF APPEALS' IMPROPERLY EMPLOYED ITS INTERPRETATION OF COMMON SENSE TO DEFEAT THE PLAIN LANGUAGE OF THE STATUTE

The Court of Appeals' decision states, "[c]ommon sense also dictates that a spouse cannot be disinherited on the ground of 'willful absence' if a divorce is pending at the time the other spouse's death." (Majority at 6). In fact, a common sense reading of MCL 700.2801(2)(e)(i) must lead to the opposite conclusion – that any spouse who is "willfully absent" for "1 year or more" shall *not* be considered the surviving spouse of a decedent, no matter what. MCL 700.2801(2)(e)(i). The "common sense" referenced by the panel majority is nothing more than a pseudonym for its own policy preferences, and it is an improper basis for modifying the language of a statute that this Court has already determined is, "clear and unambiguous." *Erwin Estate*, 503 Mich at 25. As stated by this Court:

> [T]he proper exercise of the judicial power is to determine from objective legal sources what public policy *is,* and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. This is grounded in Chief Justice Marshall's famous injunction to the bench in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177, 2 L Ed 60 (1803), that the duty of the judiciary is to assert what the law "is," not what it "ought" to be.
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> * * *
>
> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: 'The responsibility for drawing lines in a society as complex as ours--of identifying priorities, weighing the relevant considerations and choosing between competing alternatives--is the Legislature's, not the judiciary's.

Terrien v Zwit, 467 Mich 56, 66-67; 648 NW2d 602 (2002) (citation omitted).

Additionally, the "common sense" outcome of the panel majority could lead to unanticipated, inequitable results in other cases[4]. By contrast, this Court's decision in *Erwin Estate* provided objective framework by simply requiring a spouse to maintain either a physical *or* emotional connection in order to avoid a claim for abandonment. This minimal requirement can certainly be accomplished, even in the midst of divorce proceedings. Appellee could have, for instance, offered to assist with Decedent's medical or living arrangements, delivered personal effects to him, visited in the hospital or nursing home him after his surgery, called or texted him for emotional support during his recovery, or taken any number of actions to maintain *some* emotional or physical connection. Instead, she chose to live as though her marriage from Decedent had ended the day she left him. (11/7/18 Morning Transcript at p 132).

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[4] The panel majority believed the equities favored Appellee based, apparently, on Appellee's testimony before the probate court. However, the panel majority's reliance on Appellee's testimony was *contrary* to the findings of the probate court, who found Appellee lacked credibility. (12/26/18 Probate Order at pp 5, 8). As noted by this Court, deference will be given to the probate court on matters of credibility. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989); MCR 2.613(C).

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The point is not that the Court of Appeals passed judgment on whether an abandoning spouse could have, or should have, done more in this case – or any other. Rather, the point is that "common sense" can vary drastically based upon subjective views. Certainly, a blanket "common sense" exception to MCL 700.2801(2)(e) that insulates any divorcing spouses from the effects of that statute could result in nonsensical outcomes in many future cases. For example, a case could arise where a wealthy spouse runs off with a paramour, abandoning the poorer spouse. After a length of time has passed, the poorer spouse gives up hope of the wealthier spouse returning and files for divorce, only to die shortly thereafter. Under the panel majority ruling, the wealthier, abandoning spouse would be entitled, as a matter of law, to a spousal share of that poorer spouse's estate. The list of hypothetical scenarios is endless, underscoring that the public policy behind statutes must be viewed from all angles – not just the perceived facts of one case. That is why the Legislature, not the judiciary, implements laws. *Van*, 460 Mich at 327; see also *Terrien*, 467 Mich at 66-67.

In sum, the panel majority ruled, as a matter of law, that MCL 700.2801(2)(e)(i) is inapplicable when divorce proceedings are pending. In so ruling, the plain language of that statute was cast aside in favor of a new law, molded the image of the majority's policy preferences. To justify its actions, the panel majority relied upon common law decisions from California, Iowa and Georgia, the legal maxim *expressio unius est exclusio alterius* and "common sense." What the panel majority did not rely upon was the clearly articulated language promulgated by the Legislature and the binding guidance from this Court. That failure to adhere to judicial standards has resulted in an incorrect decision based upon a misapplication of the law, and Appellant requests that this Court grant leave to appeal the Court of Appeals' decision.

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II. In the Alternative, this Court Should Peremptorily Reverse for the Reasons Set Forth in the Court of Appeals Dissent

In the alternative to granting leave to appeal the Court of Appeals' decision, Appellant requests that this Court peremptorily reverse that decision pursuant to MCR 2.305(H)(1) for the reasons stated in the Court of Appeals dissent and herein. As correctly articulated by the dissent:

> Our Supreme Court has already provided binding guidance on the interpretation of MCL 700.2801(2)(e)(*i*), and unlike the majority's interpretation, the Supreme Court relied upon the plain language of the statute. In *In re Estate of Erwin*, 503 Mich 1, 9; 921 NW2d 308 (2018), the Court stated that
>
> > "an individual is not a surviving spouse for the purposes of MCL 700.2801(2)(e)(*i*) if he or she intended to be absent from his or her spouse for the year or more leading up to the spouse's death. Absence in this context presents a factual inquiry based on the totality of the circumstances, and courts should evaluate whether complete physical and emotional absence existed, resulting in an end to the marriage for practical purposes. The burden is on the party challenging an individual's status as a surviving spouse to show that he or she was "willfully absent," physically and emotionally, from the decedent spouse. [*Erwin Estate*, 503 Mich at 27-28.]"
>
> Here, it is factually undisputed that [Appellee] was both physically and emotionally absent from [Decedent] for over a year prior to his death. [Appellee] testified that when [Decedent] died "we were already divorced" and were just "waiting for the final judgment." She further testified that from May 18, 2017 until [Decedent]'s death on June 17, 2018, they lived as a divorced couple… In addition, [Appellee] unequivocally stated that she did not provide [Decedent] with any direct emotional support after May 18, 2017.
>
> * * *
>
> Rather than follow the majority's approach of disregarding the language of the statute and the Erwin Court's interpretation of it, I would instead affirm the probate court.

(Dissent at 2-3). The dissent applies the undisputed facts to controlling law, and as an alternative to granting leave to appeal, this Court should peremptorily reverse for the reasons stated by the Court of Appeals dissent.

CONCLUSION AND RELIEF REQUESTED

Under controlling Michigan law, Appellant is not Decedent's surviving spouse pursuant to MCL 700.2801(2)(e)(i). This Court should grant leave to appeal to reverse the Court of Appeals' decision and affirm the probate court's ruling in favor of Appellant. In the alternative, Appellant requests the Court peremptorily reverse for the reasons stated in the Court of Appeals dissent.

Respectfully Submitted,

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Dated: June 26, 2020

COURT OF APPEALS MAJORITY OPINION

STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF HERMANN A. VON GREIFF.

CARLA J. VON GREIFF,

Petitioner-Appellee,

v

ANNE JONES-VON GREIFF,

Respondent-Appellant.

FOR PUBLICATION
April 23, 2020
9:10 a.m.

No. 347254
Marquette Probate Court
LC No. 18-034046-DE

Before: MARKEY, P.J., and GLEICHER and M. J. KELLY, JJ.

GLEICHER, J.

Anne Jones-Von Greiff and Hermann Von Greiff were married for 15 years. During the marriage, Hermann was unfaithful to Anne. The parties argued, sometimes fiercely. On June 1, 2017, after Hermann repeatedly and angrily told Anne to "get out of my fucking house," Anne filed for divorce.

Over the course of the next year, the parties and their lawyers litigated and negotiated the dissolution of the Von Greiff marriage. Hermann stipulated that Anne could reside in the marital home, and he never returned. Hermann died shortly before the divorce judgment was signed—on June 17, 2018, slightly more than a year after the parties separated. Hermann's adult daughter, Carla J. Von Greiff, brought this action seeking to dispossess Anne of her right to inherit as Hermann's surviving spouse.

The probate court ruled that Anne did not qualify as Hermann's surviving spouse because she was "willfully absent" from him for more than a year before his death, citing MCL 700.2801(2)(e)(*i*). That statute is inapplicable to the period of time consumed by divorce proceedings. We reverse.

I

Anne and Hermann Von Greiff had a rocky relationship. The couple actually divorced in 2000, but remarried in 2003. Husband and wife sometimes lived separately, as Hermann moved away for extended periods of time to accept various job opportunities. Hermann was often unfaithful. And Hermann suffered from bipolar disorder, making him volatile and difficult to live with. As Hermann grew older, his physical health also declined. In May 2017, Hermann decided to undergo an elective spinal fusion surgery. Anne disagreed that he should undertake the risks of the operation. The couple fought, and Hermann asked his daughter Carla to fly up from Florida to take him for the surgery. Anne described that Hermann said "nasty things" to her during this period, demanded that she leave for the "hundredth time" during a "fierce attack," and told her repeatedly and angrily to "get out of my fucking house." Anne questioned whether Hermann was certain about his decision, and he responded by again ordering Anne out of the home.

Anne did not immediately leave the home, but waited for Carla's arrival. Following Hermann's surgery, he moved to an assisted living facility. In his absence, Anne and Hermann agreed that only Anne would move back into the marital home. Divorce proceedings followed.

A Michigan spouse may seek a divorce without stating a specific cause. "[A] divorce can be sought on the basis that there has been 'a breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.' MCL 552.6(1). Nothing more is required." *In re Estate of Erwin*, 503 Mich 1, 12 n 5; 921 NW2d 308 (2018). Anne Von Greiff filed for divorce on June 1, 2017. Although she did not need to, Anne alleged a cause for the breakup of her marital union: infidelity. During the divorce proceedings, Hermann admitted under oath that he had sexual relations with other women while married to Anne.

The divorce moved slowly. The parties eventually resolved all divorce-related issues but apparently could not agree regarding spousal support. The circuit court issued an opinion and order granting Anne spousal support on May 29, 2018, almost a year after the divorce action had been filed. The table was set for the prompt entry of the divorce judgment.

Unfortunately, the circuit court's spousal support opinion contained a significant error. The opinion inaccurately asserted that "Plaintiff admitted to infidelity during the marriage;" it should have stated "Defendant admitted to infidelity during the marriage." Anne filed a motion objecting to this aspect of the order and seeking its correction. But Hermann died before her motion could be heard, the error fixed, and the judgment signed. As of June 17, 2018, the date of Hermann's death, the parties had lived apart for little more than a year. In August 2018, the circuit court issued an order correcting its previous opinion and order to reflect that Hermann had been the unfaithful party.

After Hermann's death, Carla J. Von Greiff filed a petition in the probate court under MCL 700.2801(2)(e), seeking a declaration that Anne was not Hermann's surviving spouse. Section 2801(2)(e)(*i*) provides that a "surviving spouse" under the EPIC "does not include . . . [a]n individual who . . . [w]as willfully absent from the decedent spouse" for a year or more before the decedent spouse's death. Carla alleged that Anne had been "willfully absent" from Hermann for more than a year before his death.

The probate court conducted an evidentiary hearing on the petition. Anne and Carla testified extensively. The probate court found that Anne had intentionally absented herself from Hermann, physically and emotionally, for more than a year before Hermann died. Therefore, the probate court ruled, Anne did not qualify as Hermann's surviving spouse.

II

Anne now challenges the probate court's determination that she was "willfully absent" and therefore not qualified as a surviving spouse. Generally, we review for clear error a court's factual findings. *In re Estate of Erwin*, 503 Mich 1, 9; 921 NW2d 308 (2018). We review de novo a lower court's determination that a statute applies to the action before it. *Florence Cement Co v Vettraino*, 292 Mich App 461, 473; 807 NW2d 917 (2011).

The evidentiary hearing in this case was unnecessary and the probate court's findings irrelevant, because MCL 700.2801(2)(e) does not apply as a matter of law. Anne did not "willfully absent" herself from Hermann; she sought a divorce and, as many divorcing spouses do, elected to live separately while the matter made its way through the circuit court. Furthermore, Hermann formally *stipulated* to that living arrangement. Considering a combination of common sense, the common law, and a venerable canon of statutory construction: *expressio unius est exclusio alterius*, it is clear that the Legislature did not intend to disinherit a spouse whose divorce was in progress but not yet finalized when the other spouse dies.

III

We begin with a review of the common law. Just last term, in *In re Estate of Erwin*, our Supreme Court explored the meaning of MCL 700.2801(2)(e) in considerable detail. The subsections of this statute provide that a surviving spouse does not include:

> (e) An individual who did any of the following for 1 year or more before the death of the deceased person:
>
> (*i*) Was willfully absent from the decedent spouse.
>
> (*ii*) Deserted the decedent spouse.
>
> (*iii*) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law. [MCL 700.2801(2)(e).]

Like *Erwin*, this case involves subsection (*i*): willful absence.

In arriving at the meaning of the phrase "willfully absent," the *Erwin* Court observed that the three grounds for disinheriting a spouse listed under (e) are inherently fault-based and rest on intentional spousal misconduct. "Desertion" and "willful neglect" describe deliberate, unilateral choices designed to destroy the objects of matrimony. The Supreme Court explained: "MCL 700.2801(2)(e)(*ii*) and (*iii*) [addressing desertion and willful neglect] involve intentional acts that bring about a situation of divorce in practice, even when the legal marriage has not been formally dissolved." *Erwin*, 503 Mich at 15. Willful absence is somewhat more difficult to parse; one of

the questions presented in *Erwin* was whether the phrase encompassed only physical separation, or "includes consideration of the emotional bonds and connections between spouses." *Id.* at 6.

The Supreme Court interpreted "willful absence" in accordance with its "context"—its placement alongside the terms "desertion" and "willful neglect." *Id.* at 15. "A comprehensive review of the statutory scheme confirms that the term 'willfully absent' should be interpreted consistently" with the meanings of desertion and willful neglect, and the rule that a divorced spouse is not a surviving spouse. *Id.* at 15-16. For the *Erwin* majority, context dictated that both physical *and* emotional separation are required under MCL 700.2801(2)(e)(*i*). "Absence in this context presents a factual inquiry based on the totality of the circumstances, and courts should evaluate whether complete physical and emotional absence existed, resulting in an end to the marriage for practical purposes." *Erwin*, 503 Mich at 27.

Thus, MCL 700.2801(e) generally stands for the proposition that when a spouse decides to *informally* dissolve a marriage by neglecting or deserting a partner or by withdrawing from that partner both physically and emotionally, that departing spouse loses the right to inherit from the spouse left behind.

These provisions encapsulate readily understood equitable principles. A spouse who contrives an *extralegal* remedy for a failed marriage by desertion, neglect, or abandonment should not be afforded the rights available to those who follow the rules. Similarly, a spouse loses his or her right to survivorship status by willful physical and emotional absence, thereby bringing about "a practical end to the marriage," *Erwin*, 503 Mich at 17, rather than a legal end. As highlighted in *Erwin*, subsections (2)(e)(*i*), (*ii*) and (*iii*) illustrate intentional acts that destroy a marriage and leave one partner legally adrift. Laws disinheriting the selfish partners "are premised on moral policy, eclipsing the usual desiderata of forced-share laws." Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U Ill L Rev 235, 270 (2018).[1]

Divorce is different.

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[1] Before the advent of no-fault divorce, Michigan law required that the party seeking a divorce prove fault on the part of the other party. See *Rosecrance v Rosecrance*, 127 Mich 322; 86 NW 800 (1901). Desertion was a ground for divorce, characterized in the caselaw as: "(1) cessation of cohabitation, (2) abandonment by his spouse without fault on complainant's part, and (3) that the abandonment or separation was against the will and desire of the party seeking the decree." *Ferguson v Ferguson*, 310 Mich 630, 633; 17 NW2d 777 (1945) (quotation marks and citations omitted). A court could find a marital partner "guilty" of desertion, and divorced against that partner's will. See *Fanner v Fanner*, 326 Mich 466, 469; 40 NW2d 225 (1949) ("We honor defendant's scruples against divorce but she has refused to comply with the conditions of married life and under all the circumstances we must consider that she is guilty of desertion since 1944—therefore, for a period much greater than two years, as plaintiff claims."). It makes sense that the Legislature would treat a spouse who deserts or abandons his or her partner as though divorced for the purposes of survivorship.

During a divorce action, the court considers the parties' incomes, liabilities, premarital property, and abilities to work. Both partners weigh in. Ideally, the court equitably distributes the marital property in a manner that allows both parties to live independently. The divorce judgment eliminates the need for any property distribution after an ex-spouse dies, which is why a divorced spouse is not a surviving spouse. MCL 700.2801(1).

Here, however, the divorce was incomplete when Hermann died. As best we can tell, no one deliberately delayed the process; sometimes, divorces take more time than anticipated or hoped. The point is that by filing for divorce, Anne sought to bring about a *legal* end to her marriage. She did not intend to abandon or desert Hermann by consigning him to a marriage with none of the fundamental attributes of a marriage. Rather, Anne intended to exercise her legal right to seek a divorce decree, and to enforce the rights due her as a divorcing spouse.[2] Those rights potentially included spousal support, and certainly included an equitable division of marital property. Anne's invocation of legal process allowed Hermann to protect his property rights, too.

The common law recognizes the distinction between a divorcing couple and a couple living separately due to one party's desertion. For example, in *In re Ehler's Estate*, 115 Cal App 403, 405-406; 1 P2d 546 (1931), the California Supreme Court found that a widow could not be automatically disinherited for abandonment because a divorce was pending at the time of the husband's death, and whether good cause existed for the separation could not be determined:

> Appellants contend that the widow voluntarily abandoned decedent, and that she thereby waived her right to claim any allowance from his estate. As a matter of fact, the record shows that she left him and instituted an action for divorce against him, which was pending at the date of his death. It was therefore never determined whether or not respondent left voluntarily or for good cause. In view of this we are of the opinion that there was a total absence of any showing that respondent by her conduct lost her statutory rights as the widow of decedent.

Applying statutory language similar to Michigan's, the Iowa Supreme Court held a surviving wife a widow entitled to inherit where she was living apart from her husband and pursing a divorce. *In re Quinn's Estate*, 243 Iowa 1271; 55 NW2d 175 (1952).[3] See also *Born v Born*, 213 Ga 830, 831;

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[2] In his answer to Anne's complaint for divorce, Hermann averred, "Defendant does not wish to be divorced but accepts the fact that if Plaintiff is requesting the dissolution of the marriage, then joins in the request for a fair and equitable division of property, resources, and debts, based on the present and future needs of both parties . . . ." Anne's right to a divorce under the circumstances is well-established. See *Draggoo v Draggoo*, 223 Mich App 415, 424; 566 NW2d 642 (1997) ("[A] divorce will be granted upon the request of only one of the original marrying parties, i.e., even over the objection of one of the marrying parties."). And a divorce must be granted if a court finds that the marriage is so broken that its "objects . . . have been destroyed," and there is no reasonable likelihood of repair. MCL 552.6(3).

[3] At the time, Iowa allowed only fault-based divorce. The Court elaborated, "It is our conclusion that the statute expresses no legislative intent that the merits of matters pertaining peculiarly to the

102 SE2d 170 (1958) ("A separation by mutual consent of the parties does not constitute desertion, and a libel for divorce by the husband on grounds other than desertion is equivalent to a separation by consent.").

Common sense also dictates that a spouse cannot be disinherited on the ground of "willful absence" if a divorce is pending at the time the other spouse's death. Many spouses separate during divorce proceedings.[4] Often, one leaves the other, physically and emotionally. If MCL 700.2801(2)(e)(*i*) is enforceable based on the time a divorce is pending, delays and gamesmanship are inevitable, particularly when the spouses are elderly or one is ill.[5]

Had there been no error in the circuit court's spousal support ruling, the parties would have been divorced within a year and Carla's claim under MCL 700.2801(2)(e)(*i*) would have died aborning. The delay in getting to final judgment was no one's fault. It is nonsensical to believe that the Legislature intended that pure serendipity could dictate whether Anne was disinherited.

IV

An amendment to MCL 700.2801 that took effect in 2017 provides further support. In its entirety, MCL 700.2801 now provides as follows:

> (1) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he or she is married to the decedent at the time of death. A decree of separation that does not terminate the status of married couple is not a divorce for purposes of this section.

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divorce court should be inquired into upon applications for widow's allowances." *In re Quinn's Estate*, 243 Iowa 1271, 1273; 55 NW2d 175 (1952). In a no-fault setting, the same rule should apply.

[4] Here, the parties *stipulated* that Anne "shall have the right to occupy the former marital residence . . . subject to" Hermann's right to remove his personal effects.

[5] We respectfully disagree with the dissent's contention that we have disregarded either the language of the statute or the Supreme Court's construction of the language in *In re Estate of Erwin*, 503 Mich 1; 921 NW2d 308 (2018). In *Erwin*, the Supreme Court labored to interpret "willfully absent" in a manner that corresponded contextually with the rest of the statute, and we have done the same. Further, we note that in *Erwin*, the majority held that the inquiry under MCL 700.2801(2)(e)(*i*) "presents a factual question for the trial court to answer: whether a spouse's complete absence *brought about* a practical end to the marriage." *Erwin*, 503 Mich at 27 (emphasis added). Anne's absence during the period that the divorce remained pending did not "bring about" the end of the Von Greiff marriage. The Supreme Court's interpretation of the statute, like ours, "giv[es] effect to the act as a whole." *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003).

(2) For purposes of parts 1 to 4 of this article and of [MCL 700.3203], a surviving spouse does not include any of the following:

(a) An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other or live together as a married couple.

(b) An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual.

(c) An individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

(d) An individual who, at the time of the decedent's death, is living in a bigamous relationship with another individual.

(e) An individual who did any of the following for 1 year or more before the death of the deceased person:

(*i*) Was willfully absent from the decedent spouse.

(*ii*) Deserted the decedent spouse.

(*iii*) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law.

(3) *For purposes of [MCL 700.3206], a surviving spouse does not include either of the following:*

(a) An individual described in subsection (2)(a) to (d).

(b) *An individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death.* [Emphasis added.]

MCL 700.3206 is titled "Funeral arrangements and handling, disposition, or disinterment of decedent's body; right and power to make decisions; priority" and is inapplicable here.

In adding MCL 700.2801(3), the Legislature carved out a new exception to the status of surviving spouse. A spouse who is a "party" to a divorce proceeding at the time of the other spouse's death may not have a say in the deceased's funeral arrangements. That's it—funeral arrangements. The Legislature did not identify "an individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death" as otherwise excluded from the status of a surviving spouse.

The United States Supreme Court has explained that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." *Christensen v Harris Co*, 529 US 576, 583; 120 S Ct 1655; 146 L Ed 2d 621 (2000) (quotation marks and citation omitted). This canon of construction, known as *expressio unius est exclusio alterius*, means that "the expression of one thing suggests the exclusion of all others." *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 712; 664 NW2d 193 (2003). The enactment of MCL 700.2801(3)(b) implies that divorcing spouses were not intended by the Legislature to fall within the categories of spouses excluded from inheriting under MCL 700.2801(2)(e). The Legislature specifically considered parties to an ongoing divorce in the context of spousal survivorship and limited only their ability to make funeral arrangements. It makes sense that no other limitation was intended. See *Pittsfield Charter Twp*, 468 Mich at 711 ("[T]he Legislature, by explicitly turning its attention to limits on the county siting power and deciding on only one limitation, must have considered the issue of limits and intended no other limitation.").

Anne Jones-Von Greiff had a legal right to divorce Hermann Von Greiff. Had the divorce proceeded a tad more swiftly, she would have been entitled to spousal support and, presumably, a fair share of the marital property. Hermann's untimely death abated the divorce, but Anne's participation in a legal divorce process, regardless of its length, did not disqualify her from survivorship status. As a matter of law, Anne survived Hermann as his wife and is entitled to the benefits of that legal status.

We reverse.

/s/ Elizabeth L. Gleicher
/s/ Jane E. Markey

COURT OF APPEALS DISSENT

STATE OF MICHIGAN

COURT OF APPEALS

In re ESTATE OF HERMANN A VON GREIFF.

CARLA J. VON GREIFF,

Petitioner-Appellee,

v

ANNE JONES-VON GREIFF,

Respondent-Appellant.

FOR PUBLICATION
April 23, 2020

No. 347254
Marquette Probate Court
LC No. 18-034046-DE

Before: MARKEY, P.J., and GLEICHER and M. J. KELLY, JJ.

M. J. KELLY, J. *(dissenting)*.

MCL 700.2801(2)(e)(*i*)—as written by the Legislature—causes an unjust result when applied to the facts of this case. But the statute is clearly written and recent, binding precedent from our Supreme Court requires that we follow it. Accordingly, I respectfully dissent.

MCL 700.2801(2)(e)(*i*) provides:

> (2) For purposes of parts 1 to 4 of this article and of section 3203, a surviving spouse does not include any of the following:
>
> * * *
>
> (e) An individual who did any of the following for 1 year or more before the death of the deceased person:
>
> *(i) Was willfully absent from the decedent spouse.*

Relying upon "common sense," the "common law," the maxim *expressio unius est exclusio alterius*, as well as caselaw and statutes from sister states rather than the unambiguous language of the statute, the majority proclaims that, because "it is nonsensical to believe that the Legislature intended that pure serendipity would dictate whether Anne was disinherited," MCL

700.2801(2)(e)(*i*) is "inapplicable to the period of time consumed by divorce proceedings." I disagree.

Our Supreme Court has already provided binding guidance on the interpretation of MCL 700.2801(2)(e)(*i*), and unlike the majority's interpretation, the Supreme Court relied upon the plain language of the statute. In *In re Estate of Erwin*, 503 Mich 1, 9; 921 NW2d 308 (2018), the Court stated that

> an individual is not a surviving spouse for the purposes of MCL 700.2801(2)(e)(*i*) if he or she intended to be absent from his or her spouse for the year or more leading up to the spouse's death. Absence in this context presents a factual inquiry based on the totality of the circumstances, and courts should evaluate whether complete physical and emotional absence existed, resulting in an end to the marriage for practical purposes. The burden is on the party challenging an individual's status as a surviving spouse to show that he or she was "willfully absent," physically and emotionally, from the decedent spouse. [*Erwin Estate*, 503 Mich at 27-28.]

Here, it is factually undisputed that Anne was both physically and emotionally absent from Hermann, her decedent spouse, for over a year prior to his death. Anne testified that when Hermann died "we were already divorced" and were just "waiting for the final judgment." She further testified that from May 18, 2017 until Hermann's death on June 17, 2018, they lived as a divorced couple. She even obtained an ex parte order prohibiting Hermann from living in the martial home.[1] In addition, Anne unequivocally stated that she did not provide Hermann with any direct emotional support after May 18, 2017. The following excerpt of Anne's testimony—quoted by the probate court in its findings of fact—is telling:

> *Q*. . . . Okay. And Ms. Jones-VonGreiff, you had no direct personal contact with Hermann VonGreiff after May 18, 2017, is that correct?
>
> *A*. Correct.
>
> *Q*. Okay. And that includes no physical contact, no telephone contact, or other direct contact with Hermann?
>
> *A*. No.
>
> *Q*. Is that correct?

[1] Eventually the parties stipulated to amend the ex parte order. Under the amended order, Hermann was still excluded from living in the martial home, but was permitted to return to it to collect personal items, so long as he gave Anne notice. The fact that there was an ex parte order that was turned into a stipulated order, does nothing to negate Anne's admissions that she was physically and emotionally absent from Hermann for over a year prior to his death.

A. Correct.

Q. Thank you. Additionally, after May 18, 2017, the only emotional support you alleged to have offered Hermann was via text messages to Hermann's daughter, Carla, is that correct?

A. Correct.

Q. Okay. And you ceased sending those messages to Carla on May 31, 2017, correct?

A. Correct.

Q. Okay. And so based on your testimony, you had no physical contact with Hermann VonGreiff after May 18, 2017 and offered no emotional support to him after May 31, 2017, correct?

A. Correct.

The probate court was entitled to credit Anne's testimony and find that Anne intended to be completely physically and emotionally absent from Hermann starting on May 18, 2017 when she left the marital home and continuing without interruption through and even beyond his death on June 17, 2018. It was during this period of time that she filed for divorce and obtained exclusive occupancy of the home and Hermann underwent a serious surgical procedure that resulted in his aftercare taking place in a succession of different facilities.

Because the divorce was not finalized before Hermann's death, there will be no judicial division of the martial estate. And because Hermann died more than a year after Anne was physically and emotionally absent from him, she is disinherited under MCL 700.2801(2)(e)(*i*). This is the unfortunate, yet proper result of applying the statute as it is written. It creates an injustice to Anne, as it would to any other divorcing spouse in a similar situation.

Rather than follow the majority's approach of disregarding the language of the statute and the *Erwin* Court's interpretation of it, I would instead affirm the probate court. That the judiciary is tasked with interpreting, and not rewriting, the laws enacted by Legislature is a tenet firmly established in our jurisprudence. See *McGhee v Helsel*, 262 Mich App 221, 226; 686 NW2d 6 (2004) (noting that this Court "may not rewrite the plain language of the statute and substitute [its] own policy decisions for those already made by the Legislature."); see also *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 199-200; 747 NW2d 811 (2008) (stating that courts "are not to rewrite the express language of statutes"). The remedy to any injustice caused by this statute must come from the Legislature and not from a panel of this court.

In its effort to wiggle free from the constraints of the statutory language, the majority begins with a review of the common law. This is unwarranted. The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., is a comprehensive statutory creation. As a result, it supersedes the common law. See *Hoertsman Contracting Co, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) ("In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific

limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.") (quotation marks and citation omitted). Thus, the majority's reliance on the common law—let alone the common law of foreign jurisdictions—is therefore unnecessary and inappropriate. It does not matter that the common law recognizes a distinction between a divorcing couple and a couple living separately due to one party's desertion of the marriage. Under the comprehensive statutory framework set forth in EPIC, that distinction is irrelevant when determining whether a surviving spouse will be disinherited under MCL 700.2801.

I find equally unavailing the majority's reliance on the 2017 amendment to MCL 700.2801 that added subdivision (3). MCL 700.2801(3) provides:

> (3) For purposes of section 3206[, which addresses funeral arrangements], a surviving spouse does not include either of the following:
>
> (a) An individual described in subsection (2)(a) to (d).
>
> *(b) An individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death.*

The majority believes that by adding MCL 700.2801(3)(b), the Legislature implied that under *all* other circumstances, an individual who is party to a divorce proceeding with the decedent when the decedent dies *is* a surviving spouse. This deduction is reached, the majority assures us, under the principle of *expressio unius est exclusio alterius*.[2] But this canon of construction cannot be employed if doing so would defeat the statute's clear legislative intent. *AFSCME Council 25 v Detroit*, 267 Mich App 255, 260; 704 NW2d 712 (2005).

Here, the legislative intent is clear: an individual is not considered a surviving spouse under MCL 700.2801(2)(e)(*i*) if he or she was willfully absent from the decedent spouse for a year or more preceding the decedent's death. And as explained in MCL 700.2801(3)(b)—without regard to whether a spouse has or has not been willfully absent for the requisite period of time—if the spouse is in the process of a divorce, he or she is never considered a surviving spouse for the purposes of making funeral arrangements. It is not the case, however, that all divorcing spouses are willfully absent for a year prior to the death of their spouse. Some spouses might start divorce proceedings but remain physically present; others might be physically absent, but emotionally supportive. Moreover, an individual who is willfully absent from the decedent spouse for *less* than a year, would still be considered a surviving spouse under MCL 700.2801(2)(e)(*i*), but would not be considered a surviving spouse for purposes of funeral arrangements under MCL 700.2801(3)(b). Because the two sections cover different circumstances, it is improper to apply the legislative exclusion that the legislature expressly set

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[2] The maxim "*expressio unius est exclusio alterius*"—the expression of one thing is the exclusion of others—is understood to mean that the express mention of one thing in a statute implies the exclusion of other similar things. *Johnson v Recca*, 492 Mich 169, 176 n 4; 821 NW2d 520 (2012).

forth for surviving spouses when addressing funeral arrangements and graft it onto the MCL 700.2801(2)(e)(*i*) to frustrate the plainly stated legislative intent. Whether a divorcing spouse is "willfully absent" or is *not* "willfully absent," MCL 700.2801(3)(b) states only that they will never be considered a surviving spouse.

Rather than interpreting the statute, the majority rewrites it to suit the majority's policy preferences. I would apply the actual language of the statute, not the majority's rewrite of it. Under the actual language of the statute, an individual is not a surviving spouse if: (1) for a year or more before the decedent's death (2) he or she was willfully absent from the decedent spouse. In contrast, under the majority's reasoning, the statute is rewritten to disinherit a surviving spouse if: (1) for a year or more before the decedent's death (2) he or she is willfully absent from the decedent spouse, and (3) he or she is not in the process of obtaining a divorce or annulment from the divorcing spouse.

Furthermore, while it is true MCL 700.2801 was amended to add a third section dealing with funeral arrangements, this does not lend support to the argument that the legislature meant something other than what the seven words they chose to put into section MCL 700.2801(2)(e)(*i*) plainly say. If anything, it lends support to the opposite conclusion: that the Legislature considered the statute, noted that it needed amendment by way of section (3), and chose *not* to amend § (2)(e)(*i*). If the Legislature is reflective of society at large, then nearly half of its members have been through the unhappy process of a divorce, and, even if they have not, it is hardly a secret that a divorce case often can linger for more than a year in court. Yet, even in amending the statute, the Legislature chose to leave section (2)(d)(*i*) as it was. The simple truth is we do not know what their intent was when they amended the statute, and this fact requires us to be agnostic on the question.

If the Legislature so desires, it can expressly state that a divorcing spouse is not disinherited by statute if his or her spouse dies before a final judgment of divorce is entered. I encourage our legislators to do so. But they have not done so, and it is not the place of the judiciary to rewrite the plain language of this or any other statute enacted by the Legislature. Therefore, because the statute itself is clear and it makes no provision or exception for spouses going through a divorce, we must apply the statute as it is written, and leave the task of amending the statute to the Legislature.

/s/ Michael J. Kelly

MARQUETTE PROBATE COURT ORDER

STATE OF MICHIGAN

PROBATE COURT

FOR THE COUNTY OF MARQUETTE

IN THE MATTER OF:

ESTATE OF HERMANN VONGREIFF
_____/

File No. 18-34046-DE

Hon. Cheryl L. Hill

ORDER FINDING ANNE JONES-VONGREIFF NOT THE SURVIVING SPOUSE OF HERMANN VONGREIFF PURSUANT TO MCL 700.2801

FINDINGS OF FACT

The Respondent, Anne Jones-VonGreiff and the decedent, Hermann VonGreiff were married twice. The first marriage occurred on June 12, 2000. The marriage ended in divorce within several months. Anne and Herman, however, remarried on January 10, 2003. The parties remained legally married until the death of Hermann on June 17, 2018. Petitioner, Carla VonGreiff, daughter of Hermann VonGreiff has petitioned this Court under MCL 700.2801 (2)(e) for a finding that Anne Jones-VonGreiff is not the surviving spouse of Hermann VonGreiff.

Testimony was provided to the Court regarding the marital life of Hermann VonGreiff and Anne Jones-VonGreiff for the year or more before Hermann's death.

The facts established that Anne and Hermann, after their second marriage on January 10, 2003, lived as a marital couple. The marriage was not without difficulties. There were periods of infidelity on the part of Hermann VonGreiff as well as issues of physical and mental health problems suffered by both parties.

The testimony centered on the time period from May of 2017 until Hermann's death in June of 2018.

Hermann VonGreiff suffered from spinal issues. He sought to deal with the issues through medical intervention and scheduled a surgery for May 19, 2017. Anne VonGreiff was not in favor of Hermann undergoing surgery as she felt that he was too weak for the procedure. The couple had an argument on the evening of May 16, 2017. This argument precipitated Anne VonGreiff leaving the marital home. It was Anne's belief that Hermann wanted her out of the house and that he wanted to divorce her. Anne testified that Hermann said very hurtful things to her. She admitted that the couple had argued in the past but this time he was very angry, swore at her, and told her to leave the house.

Although Anne believed Hermann wanted her to leave the home, she did not leave on the evening of May 16th. She and the Petitioner, Carla, had a telephone conversation wherein Carla decided that she would come to Marquette to be with her father during his time of surgery.

Carla arrived in Marquette on May 18, 2017. Anne VonGreiff met Carla at the airport and showed Carla where the hospital was as Carla would be driving her father to his surgery on the following morning.

Upon delivering Carla to the marital home, Anne collected her bags and the dog and left the home.

Anne admitted that before leaving the home, Hermann asked her to stay. Anne left despite Hermann's request that she stay.

After leaving the home, Anne and Carla exchanged a few text messages. On the evening of May 16 2017, Anne texted Carla and inquired as to Hermann's status. Anne indicated that she was, "Sorry for everything," and asked that Carla keep her updated on Hermann's surgery.

On the day of Hermann's surgery, Anne texted Carla inquiring as to Hermann's status. Upon receipt of Carla's text updating Anne, Anne advised Carla she was glad Hermann was okay. She also advised Carla that she would drop off the keys and checks at the marital home.

Anne did not visit Hermann while he was in the hospital. Anne also never spoke to Hermann again after she left the marital home on May 18, 2017.

There were some additional text messages to and from Carla. Carla texted Anne on at least two occasions asking her to come to the hospital to speak with Hermann. Anne did not think it was a good idea to go to the hospital and therefore, she did not. She also made a point during her testimony to point out it was Carla requesting that she come to the hospital; not her husband.

Anne's testimony throughout the hearing in this matter was clear that after May 18, 2017 she had no contact with Hermann VonGreiff. Specifically, she was asked:

Q Okay. And Mrs. Jones-VonGreiff, you had no direct personal contact with Hermann VonGreiff after May 18, 2017, is that correct?

A Correct.

Q Okay. And that includes no physical contact, no telephone contact, or no other direct contact with Hermann?

A No.

Q Is that correct?

A Correct.

Q Thank you. Additionally, after May 18, 2017, the only emotional support you alleged to have offered Hermann was via text message to Hermann's daughter, Carla. Is that correct?

A Correct.

Q Okay. And you ceased sending those messages to Carla on May 31, 2017?

A Correct.

Q Okay. And so based on your testimony, you had no physical contact with Hermann VonGreiff after May 18, 2017 and offered no emotional support to him after May 31, 2017, correct?

A Correct.

Anne was of the firm belief that Hermann was going to file the divorce after his surgery. It was her belief that Hermann wanted her out of his life and out of the house. She was very upset with the fight the couple had on May 16, 2017. As such, she sought legal advice. Anne testified that she had reached a point in her marriage with Hermann where she did not know if she could go on any longer. She felt her husband had thrown her out of the house and she wanted legal direction. Following legal advice, Anne went to the bank to check on a joint account she and Hermann had. She found that most of the money had been withdrawn. She was not certain but believed that Carla, under a POA from Hermann, had removed the money.

Anne contacted a divorce attorney on May 22 or 23, 2017. She signed a Complaint for Divorce on May 31, 2017 and the Complaint was filed with the Court on June 1, 2017. Hermann was served with the Complaint on June 2, 2018 while still in the hospital.

Along with filing the divorce, Anne Jones sought an Ex Parte Order that granted her exclusive use of the marital home. The Order was entered and she was provided with exclusive use of the marital home, the Order further required that Hermann pay the mortgage, the home equity loan, utilities, and all other debts associated with the marital home.

During testimony, Anne VonGreiff stated that her intention in having an Ex Parte Order issued was to keep Hermann's children out of the home. She, however, admitted that by getting the Ex Parte Order, Hermann could not return to the home and she also admitted that she no longer wanted Hermann living with her. At the time of entry of the Ex Parte Order, Anne

VonGreiff did not think that Hermann should come back to the home, as she felt he should go someplace where someone could take care of him.

The Court notes that Ms. VonGreiff's testimony was somewhat contradictory as later in her testimony, she indicated that she did not know that the Ex Parte Order meant that Hermann could not come back home.

The Ex Parte Order was modified to a certain extent later in the divorce proceeding. The modification allowed Hermann access or his agent access to the marital home to obtain his property. The order was not modified to an extent that it allowed Hermann to reside in the home; that exclusive right was left to Ms. Anne Jones-VonGreiff.

Sometime after filing for divorce, Hermann moved to Mill Creek, an assisted living facility. Anne was not told by Hermann, nor did she inquire of him as to where he was going upon being released from the hospital. Anne apparently found out by receiving a phone call from a nurse at Mill Creek. At some point after residing in Mill Creek, Hermann moved to Florida. Hermann died while residing in Florida. Anne found out from a realtor some nine days after his death that he had passed.

At no time after filing the divorce, did Anne Jones-VonGreiff ever express a desire to live with Hermann. Ms. VonGreiff further agreed that after the filing of the divorce, she never had an intention to return to the marriage. She agreed that for all intents and purposes, that she and Hermann lived as a divorced couple from May 18, 2017 until his death on June 17, 2018.

Hermann VonGreiff did not attempt to contact Anne either. He did not advise her of his move to Mill Creek or to Florida. He blocked his Facebook page and at some point, it is believed by Anne that he changed his phone number.

Hermann VonGreiff died before the judgment of divorce was entered. The divorce trial, however, took place on April 18, 2018. The Judgment of Divorce was submitted on Notice of Presentment and objections were set to be heard; however, Hermann died before the hearing. Because the divorce judgment had not been signed, the matter was dismissed on August 8, 2018.

CONCLUSIONS OF LAW

The issue before the Court is whether given the totality of the circumstances, Anne Jones-VonGreiff intended to be physically and emotionally absent from Hermann VonGreiff, resulting in a practical end to their marriage.

The burden is on the Petitioner, Carla VonGreiff, to show that Anne VonGreiff does not meet the qualifications of a surviving spouse. The Petitioner must show that MCL 700.2801 has been met.

MCL 700.2801 provides, in part:

> (2) for purposes of part one to four of this article and section 3203, a surviving spouse does not include any of the following:
>
> . . .
>
> (e) an individual who did any of the following for one year or more before the death of the deceased person:
>
> (i) was willfully absent from the decedent spouse.
> (ii) deserted the decedent spouse.

The Court is guided by the decision of *in re Irwin Estate* _____ Mich _____; _____NW 2nd _____ (2018)(Dockett #153980-153981). The Irwin case stands for the proposition that an individual is not a surviving spouse for the purposes of MCL 700.2801 (2)(e)(i). If he or she intended to be both physically and emotionally absent for the year or more leading up to the decedent's spouses passing. Absence in this context presents a factual inquiry based on the

totality of the circumstances and a court should evaluate whether complete physical and emotional absence existed resulting in an end to the marriage for practical purposes.

Anne Jones-VonGreiff relies upon the fact that she did not leave the marital home for the full year preceding Hermann's death. She admits she left the marital home for approximately twenty nights during the time in which Hermann was in the hospital and his daughter, Carla, was staying in the home while Hermann was in the hospital. Upon Carla returning to her home in Florida, Anne moved back into the marital home. While it is true that Anne did not leave the marital home, she did seek and was successful in obtaining an order in the action for divorce that gave her exclusive use of the marital home. This order was modified to allow Hermann and/or his agent access to the home to obtain personal belongings. The order, however, remained throughout the divorce proceedings. Anne may have remained in the home; however, she also successfully excluded Hermann from returning. Anne's unilateral action in requesting an Ex Parte Order effectively prohibited Hermann from returning to the home.

This Court did not find Anne Jones-VonGreiff's testimony that she did not understand that the Ex Parte Order would preclude Hermann VonGreiff from returning to the home credible. Anne and Hermann's physical separation was not a result of occupation or civic duty as detailed in *Erwin* (supra). The facts are clear the parties were physically separated.

Having established that there was a physical absence, the Court must also evaluate if there was an emotional absence from the deceased spouse. The Court finds that there was an emotional absence as well as a physical absence.

There were actions on the part of Anne Jones-VonGreiff indicating a conscious decision to permanently no longer be involved in her marriage with Hermann VonGreiff. The facts clearly show:

1. Anne Jones-VonGreiff did not have physical contact or attempt to make physical contact with Hermann VonGreiff from May 18, 2017 until his death in June, 2018.

2. Anne Jones-VonGreiff filed for divorce while her husband was in the hospital.

3. Anne Jones-VonGreiff obtained an Ex Parte Order for exclusive use of the marital home, which prohibited Hermann VonGreiff from returning to the marital home.

4. Anne Jones-VonGreiff had no physical contact, no telephone or written contact with Hermann VonGreiff after May 18, 2017 until his death.

5. Anne Jones-VonGreiff admitted that after May 18, 2017, the only emotional support she offered to Hermann was via text messages to Hermann's daughter Carla.

6. Anne Jones-VonGreiff ceased sending any messages to Carla inquiring about Hermann as of May 31, 2017.

7. Anne Jones-VonGreiff agreed that for all intents and purposes, she and Hermann lived as a divorced couple from May 18, 2017 until his death.

8. Anne Jones-VonGreiff went forward with her divorce action against Hermann and continued to ask for a divorce.

Anne Jones-VonGreiff testified that leaving Hermann and filing for divorce was a very emotional time for her and she went on to say that her attorneys took over her life and that she was told that the judge gave her exclusive rights to the home. She unsuccessfully attempted to make this Court believe she was uninvolved in the legal decisions affecting her life. The Court believes Ms. Anne Jones-VonGreiff to be a well-educated, sophisticated, woman. While this may have been a very emotional point in her life, if she did not want to exclude Hermann from the home, even after entry of the Ex Parte Order, she could have requested that her attorneys have the order vacated. She did not do so. She clearly sought and was granted exclusive use of the marital home. This Court is not looking to Anne Jones-VonGreiff to make a continuous effort to maintain the marital relationship. Rather, this Court is focused on the "absenting" practiced by Anne Jones-VonGreiff. She filed for divorce, sought exclusive use of the home, told the Court in her testimony that after filing for divorce, she never had the intent to return to the marriage. She

agreed that the couple lived as a divorced couple after May 18, 2017. The fact that she never contacted Hermann, support her statements that it was her intention to leave the marriage.

Anne Jones-VonGreiff forced Hermann VonGreiff from the marital home. She expressed that she had reached a point in her marriage when she could not go on any longer.

The Erwin case stands for the proposition that a party seeking to establish that a spouse is not a surviving spouse pursuant to MCL 700.2801(2)(e)(i) does not need to show that the spouse intended to dissolve the marriage, only that the surviving spouse intended to be absent from the decedent spouse. The actions of Anne Jones-VonGreiff go further than what is necessary to be proved. In this case, Anne Jones-VonGreiff intended to dissolve the marriage. In fact, if Hermann VonGreiff had not died when he did, this marriage would have been dissolved by divorce. The parties had already gone forward with a trial in this matter, proofs had been submitted, a proposed judgment had been submitted, and the parties were set to go to court to pose objections to the final language of the divorce.

SUMMARY

In answering the question whether given the totality of the circumstances, Anne intended to physically and emotionally absent herself from Hermann resulting in a practical end to the marriage. The Court finds in the affirmative.

Anne and Hermann did not co-habitate during the last year of his life. Not only did they not co-habitate, Anne did not have contact with Hermann from the day she left the home in May of 2017. It is true that Hermann also did not have contact with Anne. Anne, believing that her marriage was at an end, filed a claim for divorce and sought and received exclusive use of the marital home. Anne's testimony was clear that she no longer wanted to live with Hermann and that she provided no emotional support to Hermann after filing for divorce. There was no

indication from Anne that at any time from May 2017 until Hermann's death felt that she and Hermann were still husband and wife. There was no testimony or evidence showing an emotional connection between Hermann and Anne. There was no evidence of the couple's continuing relationship for the one year preceding the death of Hermann VonGreiff.

This Court finds that Anne Jones-VonGreiff is not a surviving spouse for the purposes of MCL 700.2801 as there was a physical and emotional absence by Anne Jones-VonGreiff that resulted in the end of the VonGreiff's marriage for all practical purposes. Anne took action that was akin to a complete repudiation of the marriage.

This Court finds that the burden of Carla VonGreiff on challenging Anne Jones-VonGreiff's status as a surviving spouse has been met. Carla VonGreiff has demonstrated that Anne Jones-VonGreiff was willfully absent, physically and emotionally from decedent, Hermann VonGreiff.

PETITION IS GRANTED. IT IS SO ORDERED.

Date: 12/26/18

Honorable Cheryl L. Hill, Probate Judge P43370